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No. 82-527

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

HARDLINE ELECTRIC, INC., *Petitioner,*

v.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 1547, *Respondent.*

BRIEF FOR RESPONDENT IN OPPOSITION

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Electrical Workers
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QUESTION PRESENTED

Should an employer have the right to sue a union for damages without first exhausting the mandatory grievance and arbitration procedure provided for in the collective bargaining agreement when an injunction was issued enjoining an alleged wildcat strike on the basis that the dispute was arbitrable?

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BRIEF FOR RESPONDENT IN OPPOSITION

Respondent, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, Local Union #1547, opposes the petition of HARDLINE ELECTRIC, INC. for a writ of certiorari to review the opinion and judgment of the Ninth Circuit entered in this case, *Hardline Electric, Inc. v. IBEW L.U. #1547,* 680 F.2d 625 (9th Cir. 1982).

OPINIONS BELOW

The opinion of the Ninth Circuit, as well as the opinion, findings of fact and conclusions of law and judgment of the district court are adequately set forth and indexed in the petition.

JURISDICTION

The jurisdictional requisites are adequately set forth in the petition.

COUNTERSTATEMENT OF THE CASE

The primary issue in this appeal is the employer's right to sue the union for damages without first exhausting the contractual grievance and arbitration procedure mandated by the collective bargaining agreement. (A-11)[1]. The dispute arose out of an alleged wildcat strike against the employer by some members of the union. (A-8). The union denied there was a strike, contending that members declined to accept jobs with the employer, believing the work unsafe. (A-8,9).

The employer invoked jurisdiction of the federal courts asserting that the dispute was arbitrable. (A-16). The district court granted an injunction against further strike activity and at trial awarded damages to the employer. (A-7). During the pendency of this case in the Ninth Circuit, this Court decided *Complete Auto Transit, Inc. v. Reis,* 451 U.S. 401 (1981), and the judgment against individual members was vacated by stipulation of parties (A-21).

The employer did not argue the dispute would not have been arbitrable under the contract (A-12), but that the union had waived its right to arbitration (A-12). The Ninth Circuit found no waiver on the facts of the case, but did give an example when a waiver could be found (A-14; A-23, 24 n.3). The Ninth Circuit found that the strike was enjoined on the basis that the dispute was arbitrable, but that the parties had not been ordered to arbitrate by the district court (A-16).

The president of the employer company testified at trial that a grievance "might have been filed," but that no further action was taken (A-16). The Ninth Circuit held that the employer is estopped to argue that the union had waived its right to arbitrate (A-16). The Ninth Circuit held that "it would vitiate the Norris-La Guardia Act, and condone an abuse of the federal courts, to allow Hardline to proceed with its damages action without first exhausting its arbitral remedies." (A-17).

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[1] "A" references are to appendix A, "B" to appendix B.

The employer alternatively argued that: "this suit is actually one to enforce a prior arbitration award." (A-12). The Ninth Circuit found several questions remained that should have to be arbitrated (A-14). Among these were the scope of the union's duty to combat a wildcat strike and whether the union initiated or condoned the work stoppage (A-14). Another question was whether union members' refusal to accept a job would be a work stoppage (A-14). The Ninth Circuit examination of the prior arbitration revealed that it "covered a different job at a different place and time with different duties" (A-23), concluding that the present suit could not be construed as a suit to enforce the prior arbitration (A-14).

The Ninth Circuit vacated the injunction as overbroad, lacking factual support for its issuance, and remanded the case to the district court to reconsider the propriety of issuing a new injunction (A-19). The judgment for damages against the union was reversed, and the case remanded for stay or dismissal pending arbitration (A-20).

REASONS FOR DENYING THE WRIT

There are three basic reasons for denying certiorari in this case. First, petitioner has incorrectly stated the facts of the case, has distorted the holding of the Ninth Circuit, and has failed to demonstrate that the employer has been deprived of any right by the Appellate decision. Thus, petitioner has not shown a sound basis upon which certiorari can be granted. Second, the Ninth Circuit correctly decided this case and did so by way of reasoned application of this Court's prior federal labor law decisions. Third, the alleged conflict between the decision herein and the decisions of other courts of appeals is, upon analysis, not a true conflict that merits resolution by this Court. For these reasons, the Court should deny certiorari in this case.

I. PETITIONER HAS INCORRECTLY STATED THE CASE.

In its petition for writ of certiorari, the employer asserts that, "the Ninth Circuit held that even though neither Hardline (employer) nor the union ever requested arbitration on the dispute involved in this case, Hardline (employer) was limited to the remedy of arbitration." Petition at 3, 4. Such a claim distorts the Ninth Circuit's holding in this case. The employer invoked federal jurisdiction on its assertion the dispute was arbitrable. *See* App. A-16. The Ninth Circuit did not hold that the employer was limited to the remedy of arbitration. What the Ninth Circuit held was that: "It would vitiate the Norris-LaGuardia Act, and condone an abuse of the federal courts, to allow Hardline to proceed with its damages action without first exhausting its arbitral remedies." App. A-17.

Despite the clarity of the opinion below, petitioner has misunderstood. Petitioner's analysis would mislead this Court into believing the Ninth Circuit did not follow this Court's decision in *Republic Steel v. Maddox*, 379 U.S. 650 (1965). The Ninth Circuit cited *Republic Steel* for the proposition that exhaustion of contractual remedies is *normally* required. App. A-11. (Emphasis added.) Petitioner ignores the Ninth Circuit's citation and analysis of *Republic Steel*. Instead, petitioner chooses to argue that *Republic Steel* was cited for the proposition that an employer is required to exhaust its arbitral remedies before seeking damages under 29 U.S.C.§ 185 for an alleged breach of contract by a union. Petition at 7. To support its theory the petitioner refers to dicta in a footnote the court used in explaining why the facts of this case would not support a waiver of arbitration. *See* App. A-14. *See also* App. A-23,24. n.3 (Explanation of when a waiver could be found.)

Petitioner has ignored the opinion of the Ninth Circuit on the issue of a waiver. The attack on the Ninth Circuit is based not on the opinion, but on the petitioner's failure to read the opinion. Indeed, the petition states:

> The Ninth Circuit's decision was not based on the particular facts of the case, but rather was based on the principle that whenever *any* employer obtains a *Boys Markets* injunction, the right to seek damages in court for the Union's breach of the collective bargaining agreement is extinguished. Petition at 14. (Emphasis in original.)

Petitioner does not cite any part of the opinion to support this conclusion. Apparently the petitioner believes that an employer should be able to invoke federal court jurisdiction on the basis that a dispute is arbitrable and then go directly to trial without exhausting arbitrable remedies. The Ninth Circuit refused to allow the employer's claim for damages where the employer did not even attempt to arbitrate, but went directly to trial. *See* App. A-16, A-17. The proper conclusion to draw from the opinion below would be that when jurisdiction is sought because a dispute is arbitrable, an order to arbitrate should be issued when an injunction is granted.

Petitioner seeks jurisdiction of this Court because of the "absolute" nature of the rule enunciated by the Ninth Circuit. Petition at 14, 15. Petitioner does not cite any portion of the Ninth Circuit's opinion to support the argument and conclusion that an absolute rule enunciated. Respondent submits that the Ninth Circuit did not enunciate any absolute rule, but merely followed the guidelines laid down by this Court in its previous decisions in the labor law field.

II. THE ISSUES IN THIS CASE HAVE BEEN DECIDED CORRECTLY BY THE NINTH CIRCUIT AS IT HAS FOLLOWED PRIOR DECISIONS OF THIS COURT.

An analysis of the court's opinion reveals that the Ninth Circuit was correct in its application of this Court's prior labor law decisions. The court below was faced with the question of whether an employer should be foreclosed from pursuing its action for damages before the employer exhausts the contractual grievance and arbitration procedure mandated by the collective bargaining agreement. App. A-11.

The Ninth Circuit recognized that this Court has addressed the exhaustion question several times previously. At the onset of the court's analysis the Ninth Circuit held:

> Section 301 of the LMRA, 29 U.S.C. § 185, confers jurisdiction on the district court over suits by or against labor organizations to enforce the terms of a collective bargaining agreement. However, where the collective bargaining agreement provides for mandatory arbitration of some or all of the issues in the dispute, exhaustion of contractual remedies is normally required. See *Republic Steel v. Maddox*, 379 U.S. 650, 85 S. Ct. 614, 13 L.Ed.2d 583 (1965). Doubts as to whether the dispute is arbitrable should be resolved in favor of arbitrability. *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564, 80 S. Ct. 1343, 4 L.Ed.2d 1403 (1960); *United Steelworkers v. Warrior & Bulf Navigation Co.*, 363 U.S. 574, 80 S. Ct. 1347, 4 L.Ed.2d 1409 (1960); *United Steelworkers v. Enterprise Wheel & Car Corp.*, 636 U.S. 593, 80 S. Ct. 1358, 4 L.Ed.2d 1425 (1960) (*Steelworkers trilogy*)

App. A-11, A-12. The employer in this case invoked jurisdiction on the basis the dispute was subject to arbitration. *See* App. A-16. The Ninth Circuit followed the mandate of the *Steelworkers trilogy* and resolved the doubt as to arbitration in favor of arbitration.

Petitioner now seeks certiorari on its assertion that the Ninth Circuit erroneously applied *Boys Markets* and *Republic Steel*.

Petition at 13. However, as discussed below, the petitioner has cited no cases that supports its proposition that there is a conflict between the circuits that requires a reversal by this Court. Indeed, other than one citation to dicta in a footnote, petitioner does not even cite any other portion of the opinion to support its argument that the appellate court was in error.

The Ninth Circuit cited *Republic Steel* for the proposition that exhaustion of contractual remedies is normally required. *See* App. A-11. This Court has recognized the need for grievance and arbitration procedures. In *Republic Steel* this Court held that "Congress has expressly approved contract grievance procedures as a preferred method for settling disputes and stablizing the common law of the plant." *Republic Steel*, 379 U.S. at 653. The Ninth Circuit refused to allow the employer to proceed on its damage action without first exhausting its arbitral remedies. *See* App. A-17. The Ninth Circuit did not hold that the employers' damage action was extinguished.

This Court has already "cautioned the lower courts against usurping the functions of the arbitrator." *Boys Markets, Inc. v. Retail Clerks Union, Local 770*, 398 U.S. 235, 243 (1970). The Ninth Circuit guarded against the usurping of the arbitrator's functions by reversing the district court and remanding the case for stay or dismissal pending arbitration. *See* App. A-20.

In the instant case an alleged wildcat strike was enjoined over a grievance in which both parties were bound to arbitrate. An injunction was issued without any order to arbitrate. *See* App. A-16. In *Boys Markets* this Court held:

> When a strike is sought to be enjoined because it is over a grievance which both parties are contractually bound to arbitrate, the District Court may issue no injunctive order until it first holds that the contract does have that effect; and the employer should be ordered to arbitrate, as a condition of his obtaining an injunction against the strike.

Boys Markets, 398 U.S. at 1594. In the present case there was no order to arbitrate. *See* App. A-16. No testimony was taken and no findings were made on the issue of arbitrability. App. A-18. The opinion of the Ninth Circuit follows this Court's holding in *Boys Markets*. Therefore, the decision below should be affirmed.

In a very similar case, *Drake Bakeries, Inc. v. Local 50, American Bakery & Confectionery Workers*, 370 U.S. 254 (1962), this Court held:

> If the union did strike in violation of the contract, the company is entitled to its damages; by staying this action, pending arbitration, we have no intention of depriving it of those damages. We simply remit the company to the forum it agreed to use for processing its strike damage claims.

Id. at 266. The Ninth Circuit did not deprive the employer of any damage remedy in this case; it simply remanded the case to the district court for stay or dismissal pending arbitration. App. A-20.

The case at hand and *Drake Bakeries* have many similarities. In both cases an employer sought damages for breach of a no-strike clause alleging that the union instigated and encouraged its members to strike or not to report for work. *Drake Bakeries* at 258; App. A-8. Both cases involved collective bargaining agreements that had provisions insulating the union from damages for strikes which the union did not authorize. *Drake Bakeries*, 370 U.S. at 259; App. at B-2, 3. In this case there remains several questions to be answered by an arbitrator.

Prior arbitration in this case did not address any question concerning the union's duty to force its members into taking a job with an employer for which the individual members did not want to work. As the Ninth Circuit stated:

> (T)he question remains whether their refusal to accept a job constituted a work stoppage and, if so, whether the Union initiated or condoned the work stoppage in 1978. There is also a question as to the scope of the Union's

> duty under the contract to combat a wildcat strike if one, in fact, occurred. The prior arbitration did not address this question. It would have to be arbitrated.

App. A-14. The Ninth Circuit reversal of damages should be affirmed on the basis of this Court's prior decisions in *Drake Bakeries, Boys Markets,* and *Republic Steel.*

Petitioner's legal theory would clearly undermine the federal labor policy favoring arbitration. The employer could use the no-strike/arbitration clauses in a collective bargaining agreement to invoke jurisdiction for an injunction preventing work stoppages, but circumvent the arbitration procedure and sue directly in district court for damages. Arbitration as a forum to resolve labor-management disputes would be eliminated. Parties to a collective bargaining agreement would be in district courts for trial on the merits interpreting the agreement's terms. Petitioner's claims cannot withstand analysis and cannot support a grant of certiorari in this case.

III. THERE IS NO CONFLICT BETWEEN THE NINTH CIRCUIT AND OTHER COURTS OF APPEALS ON THE ISSUES OF EXHAUSTION OF ARBITRAL REMEDIES AND WAIVER.

As a further ground for seeking certiorari, petitioner claims that the Court must resolve an alleged conflict between the decision in this case and the nine decisions of other courts of appeals in the petition. Petitioner has represented these cases as creating a conflict by misrepresenting the Ninth Circuit in the following manner:

> The Ninth Circuit's decision in this case creates a conflict among the circuit court of appeals because the Ninth Circuit stands alone in requiring the parties to a collective bargaining agreement before filing suit under 29 U.S.C. § 185. No other court of appeals has interpreted *Republic Steel* as requiring such a result. On the contrary, nearly all other courts of appeals and all those which have considered the issue have held that the contract right to arbitration may be waived. Petition at 16, 17.

A study of the cases cited by petitioner reveals there is no conflict with the decision below.

Petitioner has not cited any case that interprets *Republic Steel* in conflict with the Ninth Circuit's interpretation. In fact, petitioner has not even cited a case interpreting *Republic Steel.* Not a single case cited by petitioner supports its proposition that there is a conflict between the Ninth Circuit and other courts of appeals.

Three of the nine cases cited by petitioner were decided before this Court decided *Republic Steel. See Radiator Specialty Co. v. Cannon Mills,* 97 F.2d 318 (4th Cir. 1938); *American Locomotive Co. v. Gyro Process Co.,* 185 F.2d 316 (6th Cir. 1950); *E.T. Simonds Constr. Co. v. Local 1330, Int. Hod Carriers,* 315 F.2d 291 (7th Cir. 1963). It is difficult to imagine how petitioner believes these cases to be in conflict with the Ninth Circuit's interpretation of *Republic Steel.* These three cases do show the frivolous nature of the petition for certiorari.

The alleged conflict between the Ninth Circuit and other courts of appeals is further eroded by the fact that the Ninth Circuit has recognized that in some cases the right to arbitration can be waived. In *Shinto Shipping Co. v. Fibrex & Shiping Co.,* 572 F.2d 1328, (9th Cir. 1978), the Ninth Circuit held that it was clear that a party could waive its right to arbitration. *Id.* at 1330. In support of its proposition in *Shinto* the Ninth Circuit cited two cases: *Demsey & Assoc., Inc. v. S.S. Sea Star,* 461 F.2d 1009 (2d Cir. 1972) and *Cornell & Co. v. Barber & Ross Co.,* 360 F.2d 512 (D.C. Cir. 1966). *Shinto* at 1330. *Demsey* and *Cornell* were both cited by petitioner as examples of the conflict with the Ninth Circuit. *See* Petition at 8, 9, 16, 17. There can be no conflict when the decisions petitioner uses to show a "conflict" actually square with the Ninth Circuit on the issue of waiver.

Petitioner also cited *Morales Rivera v. Sea Land of Puerto Rico, Inc.,* 418 F.2d 725 (1st Cir. 1969), in support of the alleged conflict. Petition at 9, 16. In *Morales Rivera* plaintiff employees sued defendant employer for back wages. The employer removed to the district court on the ground of diversity and the

action was dismissed for failure to prosecute. Nine months later plaintiffs sought to have the dismissal with prejudice vacated, claiming lack of jurisdiction because a collective bargaining agreement had an arbitration clause. The *Morales* court found a waiver because the plaintiffs had originally brought the action. The instant case is easily distinguishable as it involves an employer who sought federal court jurisdiction on the ground the dispute was arbitrable and then claimed a waiver of arbitration.

Burton-Dixie Corp. v. Timothy McCarthy Const. Co., 436 F.2d 405 (5th Cir. 1971), also fails to support petitioner's position that there is a conflict between the courts of appeals on the issue of waiver. The Fifth Circuit found a waiver in *Burton-Dixie*, but in so doing, the court held that the question of what constitutes a waiver depends on the facts of each case. *Id.* at 408. The Ninth Circuit held that the facts of this case did not justify a waiver. *See* App. A-14.

Another case petitioner cited to influence this Court into believing that there is a conflict was *Reid Burton Constr., Inc. v. Carpenter District Council*, 614 F.2d 698 (10th Cir. 1978); *cert. denied*, 449 U.S. 824 (1980). The Ninth Circuit adopted "the limited exception to arbitrability fashioned in *Reid Burton*". *Cal. Trucking Ass'n v. Teamsters, Local 70*, 679 F.2d 1275, 1283 (9th Cir. 1981). The Ninth Circuit cited *Cal Trucking* as dicta when a waiver of arbitration could be found. *See* App. A-23, A-24 n.3. Petitioner is misleading this Court in arguing for certiorari by its omission of complete reference to footnote 3 in both the statement of the case and the argument. *See* Petition at 4, 7.

Another case cited by petitioner also fails to show a conflict. In *Local 198, United Rubber, Cork, Linoleum and Plastic Workers v. Interco, Inc.*, 415 F.2d 1208 (8th Cir. 1969), the union brought action to compel arbitration and the employer claimed the union had waived its right to arbitration. The Eighth Circuit found for the union and affirmed the order of arbitration. The court there held:

> Waiver is an intentional relinquishment of a known right. There is no substantial evidence to support a finding that the union waived any right it possessed to arbitrate the issues here pertinent. Likewise, substantial evidence is wanting to support the essential elements of estoppel.

Id. at 1211. The Ninth Circuit and the Eighth Circuit are in agreement as to what constitutes waiver of arbitration. The Ninth Circuit in the case below, like the Eighth Circuit in *Local 198* found that the employer was estopped to argue the union had waived its right to arbitrate. *See* App. at A-16. In *Local 198* the court found substantial evidence wanting to support the employer's estoppel theory. *Local 198* at 1211.

Petitioner's contention that the decision below is in conflict with other courts of appeals is incorrect. The claim does not withstand analysis and cannot support a grant of certiorari in this case. The framework of the decision below is consistent with other courts of appeals and, as demonstrated above, follows directly from the precedents established by this Court.

CONCLUSION

The Ninth Circuit properly decided this case and did so guided by the previous decisions of this Court. Its decision follows the federal labor policy of encouraging peaceful settlement of labor disputes. The decision should stand as rendered and the petition for a writ of certiorari should be denied.

Respectfully submitted,

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